

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEANNETTE ANN CRIQUI

Claimant

VS.

IBP, INC.

Respondent

Self-Insured

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Docket No. 193,409

ORDER

The claimant requested review of the Award entered by Special Administrative Law Judge William F. Morrissey dated November 26, 1996. Jeff K. Cooper has been appointed Board Member Pro Tem for this case to serve in place of Gary M. Korte who has recused himself from this proceeding.

APPEARANCES

Claimant appeared by her attorney, Diane F. Barger of Wichita, Kansas. The respondent, a qualified self-insured, appeared by its attorneys, Lawrence D. Greenbaum of Kansas City, Kansas, and Tina M. Sabag of Dakota City, Nebraska.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Special Administrative Law Judge's Award.

ISSUES

- (1) Whether claimant met with personal injury by accident on the date alleged.
- (2) Whether the accidental injury arose out of and in the course of her employment.
- (3) Nature and extent of claimant's disability, including work disability.
- (4) Average weekly wage.

- (5) Future medical treatment.
- (6) Unauthorized medical treatment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The Special Administrative Law Judge found claimant suffered an injury to her thoracic spine through a series of injuries while working for the respondent culminating in injury on or about June 13, 1994. The Special Administrative Law Judge further found that injury arose out of and in the course of her employment and that notice was timely given. The Special Administrative Law Judge concluded that as a result of the work related injury, claimant was entitled to a 7 percent permanent partial general disability.

The Appeals Board finds, for reasons more fully developed below, that the average weekly wage should be modified but the Special Administrative Law Judge's Award should otherwise be affirmed. The Appeals Board also finds that the Special Administrative Law Judge has set forth in his Award comprehensive findings of fact and conclusions of law that need not be repeated in this Order. Therefore, the Appeals Board adopts those findings and conclusions as its own to the extent they are not inconsistent with the findings and the conclusions below.

The claimant began working for the respondent in November of 1993. The claimant's job required her to stand at a table with her foot on a sprayer to wash tails that came down a conveyor belt. After washing the tails, the claimant would place them in a barrel behind her. The claimant alleged she washed 20 or 30 tails per minute; however, the most credible evidence would indicate that claimant washed approximately 4 tails per minute. As a result of the tail-washing job the claimant developed pain in the thoracic spine area. The evidence is clear from the dispensary records that the claimant reported her problems to the dispensary and was sent to Dr. Edward G. Campbell for treatment, who ordered x-rays which were taken on June 15, 1994. Dr. Campbell prescribed physical therapy and placed the claimant on light duty.

The claimant was seen by Dr. P. Brent Koprivica, who testified that claimant had a 12 percent impairment to the body as a whole, utilizing the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), for her bilateral upper extremities, upper back, and neck problems. Dr. Koprivica indicated the claimant should be restricted from doing repetitive activities involving her upper extremities.

Dr. Sergio Delgado opined that claimant had a 2 percent impairment of function utilizing the AMA Guides. But he also believes that the most limiting factor in the claimant's ability to work was her obesity and short height. He did not provide any specific restrictions,

but felt that she would have problems with work requirements due to her deconditioning and excessive body weight.

The claimant was given light-duty jobs of labeling boxes, painting shelves, and picking fat off a conveyor in the stir-fry area. The claimant testified that she was physically unable to do those light-duty jobs. But the evidence does not establish that those light-duty jobs were outside any restrictions placed on the claimant by the doctor.

The evidence shows that the claimant did not report to work on September 27, 28, 29, and 30. None of the doctors had taken her off work. The evidence reflects that light-duty work was available and, in fact, the claimant was denied unemployment benefits because work was available with the respondent. The claimant additionally failed to return to IBP in February or March of 1995 after being advised by Rodger Brownrigg to come in for a new job. The claimant's refusal to accept and attempt accommodated work at comparable wages precludes a finding of work disability. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). The Board, therefore, finds that claimant is limited to the functional rating which was stipulated by the parties in this case to be 7 percent.

Therefore, the Appeals Board finds that the Special Administrative Law Judge's conclusion that claimant's permanent partial general disability should be limited to the 7 percent general bodily impairment of function based upon the stipulation of the parties should be affirmed.

The Special Administrative Law Judge found claimant's average weekly wage to be \$353.71 when determined by using a six-day work week, citing Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). Respondent argues Tovar does not apply to the facts of this case and that the finding by the Special Administrative Law Judge should be modified to find an average weekly wage of \$296.51.

The Appeals Board agrees with respondent's analysis. The facts in this case are materially different from the facts relied upon by the Court in Tovar to support a 48-hour work week. The Court found that Miguel Tovar actually worked most Saturdays in addition to his regular 40-hour work week Monday through Friday. In this case, even if claimant was expected to be available to work on Saturdays if she should be scheduled to do so, claimant actually worked few, if any, Saturdays. Claimant worked very little overtime. It cannot be determined from the record how much of the overtime claimant did work was on Saturday. Accordingly, claimant's average weekly wage should be calculated pursuant to K.S.A. 44-511(b)(4) based upon a 40-hour work week at \$7.15 per hour for \$286.00 in straight-time regular wages, plus average weekly overtime and additional compensation of \$10.51 per week for a total gross average weekly wage of \$296.51.

Future medical benefits will be awarded only upon proper application to and approval of the Director. Unauthorized medical expenses will be awarded up to the statutory maximum.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey, dated November 26, 1996, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jeannette Ann Criqui, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred June 13, 1994, and based upon an average weekly wage of \$296.51 for 29.05 weeks at the rate of \$197.68 per week for a 7% permanent partial general disability making a total award of \$5,742.60 all of which is currently due and owing and ordered paid in one lump sum less any amounts previously paid.

The Appeals Board otherwise affirms and adopts the remaining orders of the Special Administrative Law Judge as set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Wichita, KS
Tina M. Sabag, Dakota City, NE
Lawrence D. Greenbaum, Kansas City, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director